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Supreme Court, U.S.
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(3)

No.

IN THE

Supreme Court of the United States

MARSHALL SPIEGEL, PETITIONER

v.

VOLVO CARS NORTH AMERICA, L.L.C.

PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Illinois courts violate the fourteenth amendment when they deprived plaintiff of the judgment entered in his favor on a jury's verdict – without oral argument and by virtue of an unpublished opinion, likely written by law clerks – where loss of the verdict was a meaningful deprivation of property, oral argument would have been a significant hedge against erroneous deprivation, and where the cost to the state of providing oral argument would have been de minimus? *See, Matthews v. Eldridge*, 424 U.S. 319 (1976).

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OPINIONS BELOW

None – the opinions and orders were unpublished, which is one of the reasons Plaintiff believes review is warranted.

JURISDICTION

The order sought to be reviewed was entered December 8, 2006. Rehearing was denied January 10, 2007. The Illinois Supreme Court denied review on May 31, 2007. This Court issued an order on Jul 31, 2007 extending the time to file a writ of certiorari until October 28, 2007, a Sunday, which makes the petition due October 29, 2007. Review is authorized under 28 U.S.C sec. 1257.

RELEVANT PROVISIONS INVOLVED

Fourteenth Amendment, Section. 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Plaintiff, Marshall Spiegel brought this action on October 9, 2001 against Volvo Cars North America, LLC for breach of warranty. The case proceeded to trial. On June 21, 2004, a jury found for Spiegel and awarded him $10,680.00 -- $7300 for diminished value; $2700 for aggravation and inconvenience and $380 for loss of use. (C 1133.). Defendant Volvo filed a Notice of Appeal on September 6, 2005 (C 1132-35.) The appellate court reversed the trial court's decision on December 8, 2006 and entered judgment *nov* against Spiegel on the basis that the diminished value evidence was admitted without proper foundation. The court never addressed the aggravation and inconvenience award or the loss of use award, and did not explain those amounts would not defeat jnov; nor did the court explain why it granted judgment nov as a result of an evidentiary error, as opposed to simply granting a new trial, which is typically the remedy for improperly admitted evidence.

REASONS FOR GRANTING THE PETITION

The Illinois appellate court did not permit oral argument, even though both parties requested it. The court deprived Spiegel of his jury verdict and judgment without the benefit of oral argument and by issuing an unpublished order, likely written by law clerks and which did not even address the major contentions raised by the parties in the appeal. Spiegel moved for rehearing, demanding oral argument, which was denied. The Illinois Supreme Court denied review without explanation. Because the constitutional error

complained of occurred at the appellate level – when the appellate court deprived Plaintiff of a jury verdict and judgment without due process by refusing oral argument – the constitutional issues could not have been raised earlier than they were: on rehearing and by seeking a petition for leave to appeal to the Illinois Supreme Court.

Argument

The fourteenth amendment to the United States Constitution prohibits any State from depriving, "any person of life, liberty, or property, without due process of law..." U.S. Const. amend. XIV, § 1. A judgment entered on a jury verdict is a property interest protected by the Constitution. This is obviously so because, as this Court has repeatedly held, a cause of action is a property right. *See, Tulsa Professional Collection Servs. v. Pope*, 108 S. Ct. 1340, 1344-45 (1988)(finding contractual cause of action to be property); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)(holding the right to bring action is property); *United States v. Security Indus. Bank*, 459 U.S. 70, 75 (1982)(holding portions of the Bankruptcy Reform Act of 1978 was an unconstitutional taking to the extent that it permitted a bankruptcy court to deprive a secured creditor of its property interest in collateral). If a mere cause of action is a property right, then certainly a judgment entered upon a jury verdict is a property right. Moreover, even if the verdict is subject to possible – or even likely – reversal, it is still worth something. This Court stressed in *Goss v. Lopez*, 419 U.S. 565, 579 (1974), "as long as the property deprivation is not de minimis, its gravity is irrelevant to whether account must be taken

of the Due Process Clause." Clearly, a $10,680 jury verdict (plus a $40,000) fee award is not de minimus.

Defendant Volvo raised numerous issues on appeal and the parties' submitted extensive and comprehensive briefs on a number of important issues. Ultimately, the vast majority of these issues were simply not addressed by the Court. Even though both parties requested oral argument, the appellate court refused to conduct one. Instead, on December 8, 2006, the clerk issued an unpublished order vacating the judgment and jury verdict in favor of Plaintiff, and entering judgment in favor of Defendant. (Order, p. 8.) The stated rationale was that the trial judge made an evidentiary error and admitted certain damages testimony on an insufficient foundation. In Illinois, as in all jurisdictions, the remedy for improper admission of evidence is a new trial, not *jnov. Bryant v. Livigni*, 250 Ill. App. 3d 303, 310 (5th Dist. 1993).

Judge Alex Kozinsky has candidly admitted that unpublished opinions are often written by law clerks. Tony Mauro, "Unpublished Opinions: Inedible Sausage of Crazy Uncle?" *Legal Times*, (April 12, 2004). And the quality of the legal reasoning in the order at issue in this case – to be quite candid – approximates that of a third-year law student. This, of course, puts this case squarely within the larger controversy regarding unpublished opinions generally, *see e.g., Anastasoff v. United States. 223 F.3d 898, 899-905 (8th Cir. 2000)* (holding that local rule stating that unpublished opinions are not precedent was unconstitutional), vacated as moot *235 F.3d 1054 (8th Cir. 2000)* (en banc), with *Hart v. Massanari. 266 F.3d 1155 (9th Cir. 2001)*

(Kozinski, J.) (holding similar rule constitutional); *Symbol Techs., Inc. v. Lemelson Med., 277 F.3d 1361, 1366-68 (Fed. Cir. 2002)* (same); see also Richard S. Arnold, Unpublished Opinions: A Comment. *1 J. App. Prac. & Process 219 (1999)*; Stephen R. Barnett, In Support of Proposed Federal Rule 32.1: A Reply to Judge Alex Kozinski. Fed. Law. Nov./Dec. 2004, at 32; Anne Coyle, Note, A Modest Reform: The New Rule 32.1 Permitting Citation to Unpublished Opinions in Federal Courts of Appeals. *72 Fordham L. Rev. 2471 (2004)*; Lawrence J. Fox, Note, Those Unpublished Opinions: An Appropriate Expedience or an Abdication of Responsibility, *32 Hofstra L. Rev. 1215 (2004)*; Hon. Alex Kozinski, Letter, Fed. Law., June 2004, at 37; Gary Young, Cite. Publish or Perish?, Nat'l L.J., May 3, 2004, at SI.

But this matter of significant public concern has been rendered even more acute (unconstitutionally so) in this case by the refusal to grant oral argument. Indeed, Spiegel has no idea whether a judicial officer was even involved in the decision to deprive him of his judgment and jury verdict. As one commentator has explained, "the public relations function of contact between attorneys and judges during argument is especially important when attorneys suspect that not all judges read the briefs or that the court's staff plays a major role in the decision process." Stephen Wasby, "The functions and importance of appellate oral argument: some views of lawyers and federal judges," pp. 352-355, in Judical Politics (Slotnick, Elliot, Eds.) The Hruska Commission echoed this perspective in pointing out that oral argument "assures the litigant

that his case has been given consideration by those charged with deciding it." *Id.*

In this case, Defendant did not avail itself of the opportunity to seek a new trial as a result of a claimed evidentiary error. Instead, Defendant chose to move only for judgment notwithstanding the verdict on a variety of state-law-based legal grounds, of no concern to this Court or relevance to this petition. While Plaintiff does not agree with the appellate court's decision regarding the sufficiency of the foundation laid at trial, Plaintiff wants to stress that the purpose of this petition, obviously, is not to quibble about the sufficiency (or insufficiency) of Spiegel's evidentiary foundation. Even if Plaintiff were to agree that the foundation was inadequate, the only legally permissible remedy was a new trial, not *jnov*. And by granting a *jnov* under such circumstances, – without hearing or oral argument – the Illinois Appellate Court committed a serious constitutional violation. This Court's review is required because it is the only form of review and only remedy for appellate level due process violations that undermine confidence in, and the legitimacy of, state court appellate systems. This Court must make it clear that a state court cannot deprive a citizen of a constitutionally-protected interest in a jury verdict without affording the due process protections of oral argument.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court established a three-part test to determine whether a pre-deprivation due process remedy is required in a given context. *Id.* at 335. The first part of the test evaluates the seriousness of the plaintiff's loss

if a pre-deprivation hearing is denied and erroneous deprivations can be challenged only through post-deprivation procedures. *Id.* The second part evaluates whether additional procedures will reduce the chance of error. *Id.* The third part of the test evaluates the governmental interest in denying a pre-deprivation hearing. *Id.* The *Matthews* test mandates oral argument before depriving a litigant of a favorable jury verdict.

Spiegel's loss was a serious one: the judgment in his favor had not only financial value, but the jury's verdict was an important public declaration of wrongdoing by Volvo. Moreover, due to serious issues of judicial immunity, post-deprivation remedies are practically non-existent. The immunity issues that Spiegel would face if he decided to sue the Illinois appellate justices for taking away his verdict are virtually insurmountable. The chances of convincing a federal court that judicial immunity does not apply are staggeringly small. (Counsel will not go so far as to claim that such an action would be frivolous, as he does not want to prejudice his client's right to attempt to pursue such claims if this Court denies review. But clearly there would be major hurdles, if not an outright bar, to pursuing post-deprivation remedies against the Illinois appellate court.) Moreover, it would be economically irrational to attempt to pursue such remedies, as they would most certainly cost more than $10,000 and cannot be feasibly pursued on a contingent-fee basis.

The second prong of the *Matthews* test considers the degree to which additional procedures would reduce the chance of error. Oral argument serves important

prophylactic purposes in preventing error due to, as in this case, basic misapprehensions about the record. Moreover, commentators have cited numerous benefits to oral argument, including: (1) to persuade judges, (2) to focus on one important matter, (3) to clarify facts, (4) to counter the oppositions arguments, especially in reply, (5) to legitimate the legal process, (6) to urge judges to read (or re-read) certain sections of the briefs, (7) to prepare judges for conference deliberations, and (8) to force judges to communicate with one another. Stephen Wasby, "The functions and importance of appellate oral argument: some views of lawyers and federal judges," pp. 352-355, in Judical Politics (Slotnick, Elliot, Eds.)

The Federal Judicial Center's lawyer survey showed that the majority of lawyers in each circuit studied agreed that "when a litigant is denied the right to have his lawyer argue his appeal, the litigant will feel that he has not had his day in court." *Id.* "Submission of briefs is not thought sufficient to assure lawyers and litigants that judges have focused on the case, because one could not be sure that the briefs were read." *Id.* As one commentator has noted, oral argument is "crucial for establishing human connection between bench and bar because it is the only face-to-face communication between attorneys and judges during a case's appellate course." *Id.* And as one Ninth Circuit judge noted, argument assists lawyers by "helping the judges to know who the attorneys are, as well as giving lawyers a notion of the orientation of the court and the way it is thinking." *Id.* The crucial role of the judge-attorney communication has often been stressed. According to William Hastie, who was a judge on the United States

Court of Appeals for the Third Judicial Circuit, "the oral argument is the Court's one chance to invite counsel to meet head on what seemed to be the strongest opposing contentions." *Id.* As noted by the Federal Judicial Center's survey, "oral argument permits the attorney to address himself to those issues which the judges believe are crucial to the case." *Id.*

Central to communication during appellate argument are the judge's questions. As one Ninth Circuit judge emphasized "the opportunity for oral argument provides for exploring doubts they had about the record and items not entirely clear." *Id.* He stated, "sometimes we can't understand until we ask questions." *Id.* Indeed, 90% of attorneys in the Federal Judicial Center survey agreed that "by asking questions of counsel, the judges are better able to avoid erroneous interpretations of the facts or issues in the case." *Id.* And Eight Circuit Judge Bright stated, oral argument "allows the judges to clear up any doubts the court might have about the case or the lawyer's approach to it." *Id.*

The third prong of the *Matthews* test – the governmental interest in denying the process – also militates in favor of review and reversal. Oral arguments at the state court level often take less than 10-15 minutes per side. Certainly it is worth this small investment of time by a panel of judges to hear argument before taking away a citizen's jury verdict. It is their job, after all, to hear and consider appeals. Moreover, the interest is much stronger in this case beause a litigant was deprived of a judgment and a jury verdict. Perhaps the state has a conceivable basis to

deny oral argument when affirming a verdict, but that is not the case here.

Under *Matthews* it was unconstitutional error to deprive Plaintiff of his jury verdict and judgment without oral argument. In *Federal Communications Commission v. WJR, The Goodwill Station*, 337 U.S. 265 (1949), this Court held under certain circumstances oral argument is constitutionally required, *id.* at 277, n.10 (citing cases). This case presents one of those circumstances. This Court has not examined the issue of oral argument as a due process requirement in over ½ a century. Appellate courts nationwide are denying oral argument in the name of judicial expediency. While this may not be a constitutional deprivation when a verdict is merely affirmed, it clearly is when a verdict is reversed.

CONCLUSION

Plaintiff urges this Court to grant review for the purpose of examining the issue of whether it is constitutional for a state appellate court to deprive a citizen of a favorable jury verdict without a hearing in the form of oral argument.

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December 8, 2006
No. 1-05-2789
IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
SIXTH DIVISION

MARSHALL SPIEGEL,
Plaintiff-Appellee,

VOLVO CARS NORTH AMERICA, L.L.C.,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
No. 01 M1 149629
Honorable Francis J. Dolan, Judge Presiding.

ORDER

Defendant, Volvo Cars North America, L.L.C., appeals from a jury verdict in favor of plaintiff, Marshall Spiegel, in this breach of implied warranty of merchantability claim brought under the Magnuson-Moss Warranty Act (Act), 15 U.S.C. § 2301, et seq. Volvo contends that the trial court erred by denying its motion for judgment n.o.v. We reverse.

On September 24, 1998, Spiegel bought a 1995 Volvo C70 convertible from Towne and Countree Auto Sales, Inc., in Schererville, Indiana, a non-party. Spiegel received a limited warranty from Volvo. At the time of trial Spiegel continued to own and operate the car and had driven it about 70,000 miles.

On October 9, 2001, Spiegel filed a three-count complaint against Volvo under the Magnuson-Moss

warranty Act (Act), 15 U. S. C. Sec. 2301, et seq., alleging; (1) breach of limited warranty; (2) breach of implied warranty of merchantability; and (3) revocation of acceptance. The case proceeded to jury trial on June 17, 2004, on counts one and two. Spiegel testified that he bought the Volvo because "[i]t's known for being the safest car in the world that's what Volvo says and that's what their ads say, for life." Spiegel considered the car an investment testifying;

"[T]he Volvo name was supposed to be reliable and dependable and something, you know - you know, you could drive it, that they would stand behind their product and, you know, I would continue to enjoy it and drive it the usual hundred thousand miles I do when I go through most cars. Each car I've owned for many years have been - I rolled it over a hundred thousand miles. So I buy and own to grow old, like a stock or a piece of real estate."

But the car would periodically fail to accelerate, sputter and "starve for fuel" even when the tank still had as much as two to four gallons of gas. and the digital readout indicated there were as many as 50 miles to drive until empty. Spiegel tried to keep the tank full but it was not always possible. Spiegel testified that he did not feel safe driving his car stating;

"It's not safe. It's dangerous, It's very unsettling to be on a highway, just like you heard yesterday, trying to accelerate a car and the car doesn't have any acceleration. You know, if you're on the highway and you need to get around somebody or avoid a situation or whatever you might need acceleration, it's terrifying not to be able to have that with you," Spiegel testified

that the car sputtered, hesitated, and lacked acceleration, "when [he] didn't have time to whatever to keep the gas up," and that "if the car ran down to the last few gallons of gas, the car would either sputter, stop, or die," and that, "the car was stopping intermittently, sputtering, the same problem that I have been having all along. You know, if the gas - gas got below a certain level, the last few gallons or whatever, it would act like it's out of gas."

Spiegel testified that he and his son were once stranded on the highway when the car died in the express lanes. They waited for an hour for help as cars sped by them. He was afraid that he and his son would be struck by another vehicle as they sat waiting in the car. Another time he had to walk to a gas station and push the car.

Spiegel testified that he brought the car in to be serviced at various Volvo certified service centers 10 times since he purchased the car but none of the service centers could fix the problem. He started experiencing problems a few weeks after purchasing the car. He took the car in to authorized Volvo service centers in October 1998, March 1999, January 2000, February 2000, November 2004, December 2000, January 2001, May 2001, July 2001, and August 2001. The car was in service for a total of 70 days. Once, when Spiegel took the car its for service, he was told to keep the tank full.

Spiegel testified that he paid over $50,000 for the car (the bill of sale states the car was purchased for $46,560) but had he known of the car's problem he never would have purchased it because it was not safe. He usually droves a car about 20,040 miles a year but he only drove the Volvo about 12,000 miles a year

because of the problem with the fuel system. Spiegel did not take as many trips out of town as usual with the Volvo, his son gets "stressed out and feels unsafe in the car and his former wife refused to drive in the car and was "terrified of it" because of the acceleration problems. Over defendant's objection Spiegel answered his counsel's question, "What do you think the car is worth?" Plaintiff replied, "I probably would not have brought the litigation, if I paid maybe $25,000."

Spiegel presented the testimony of expert Torn Walters, are ASE certified master mechanic who had worked on luxury car like Spiegel's. Walters testified that he inspects vehicles for insurance companies "to verify the cause of the failure, the amount of damage and the best possibility for repair," Walters inspected Spiegel's car and replicated the alleged fuel starvation defect on a test drive. Walter stated that it was cold that day so he did not think vapor expansion. was an issue. Walters testified, that he drove the vehicle "at which time the vehicle engine began to starve for fuel or hesitate severely. I was at that point surprised because upon the miles to empty still indicate it had 25 miles to empty. The fuel gauge still registered in the two range or two gallons left in the tank range," "I felt that 2 gallons left in the fuel tank you should not be experiencing driveability issues at that point, that the fuel should be less than that in the tank before you might experience some type of hesitation or engine actually quitting." Walters opined that the fuel starvation problem affected safety because it could cause a lack of acceleration and power when ramping into traffic. Walters also opined that there was a defect with regard to the "fuel pump and/or pickup in the tank which caused abnormal cavitation with two gallons

remaining in the tank." Walters concluded testifying that "two gallons should have been more than sufficient for normal operation," that the time he replicated the defect and "under normal circumstances that would not be correct. I felt that the vehicle should have still provided normal operation with two gallons of fuel left in the tank." Walters also stated that Spiegel could have avoided the problem by always refilling his gas tank.

Volvo presented evidence that its limited warranty provided in part, that it did not cover "[t]he loss of vehicle use, loss of time, telephone calls, towing, lodging, car rental, food, and other incidental and consequential damages." Spiegel acknowledged that the car's owner's manual stated;

"The fuel tank is designed to hold approximately 18.5 U.S. gallons * * * with sufficient volume left over to accommodate possible expansion of the fuel in hot weather. Be aware that the usable tank capacity is somewhat less than the specified maximum. When the fuel level is low, such factors as ambient temperature, the fuel's `vapor pressure' characteristics, and terrain can affect the fuel pumps' [sic] ability to supply the engine with an adequate supply of fuel. Therefore, it is advisable to refuel as soon as possible when the needle nears the red zone, or when the fuel warning light comes on."

Volvos' expert, Christopher J. Densley, a Volvo product follow-up engineer, testified that fuel starvation may occur when a car is run very low on fuel and may result in engine misfires, loss of performance, or a stall. Densley reviewed and analyzed the repair orders for the car, and inspected, tested and evaluated

the car, in particular, its fuel tank. The car had a maximum capacity of 18.5 gallons with a usable capacity of 16.65 gallons allowing for fuel vapor expansion. Densley testified that Spiegel and he tried to recreate the problems during a test drive. But, the problems occurred only when the gauge read empty and the trip miles indicator read zero, Densely explained:

"As [Spiegel] demonstrated to me on the test drive *** he's getting the sputtering and starving under acceleration. And this goes back to what we described a few moments ago where you have a fairly large tank with a very flat bottom. Under acceleration, the fuel will slosh to the back of the tank. If you have a long acceleration and that fuel remains stuck against the back of the tank the fuel pickup which is located centrally in the tank can't get at that fuel and has trouble supplying fuel to the engine." * * * you'll get misfires, you'll get loss of performance and obviously, ultimately its possible to get a stall."

Densley opined that the car's fuel tank was "not defective in any way, shape, or form" and that engine fuel starvation occurred because of the car being run on very low fuel.

Volvo moved for a directed verdict. The trial court denied Volvo's motion and submitted both counts to the jury. The jury found to favor of Spiegel on the implied warranty of merchantability claim and in favor of Volvo on the breach of limited warranty claim and awarded Spiegel $10,680; $7,300 for diminished value, $680 for loss of use, and $2,700 for aggravation and inconvenience. The trial court denied Volvo's motion for judgment n. o. v. and found in favor of Volvo on

Spiegel's revocation of acceptance claim. The trial court then awarded attorney fees and costs to Spiegel in the amount of $31,479.30. This timely appeal followed.

On appeal, Volvo contends that the trial court erred by denying its motion for judgment n. o. v. because Spiegel failed to establish a prima facie case of breach of implied warranter of merchantability.

A judgment n. o. v. may be granted only when all of the evidence, when viewed in a light most favorable to the plaintiff, so overwhelmingly favors the defendant that no contrary verdict based on that evidence could ever stand. Pedrick v. Peoria & Eastern R.R. Co., 3 7111. 2d 494, 510 (1967). A motion for judgment n. o. v. presents a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences. from it, there is a lack of evidence to prove any necessary element of the plaintiff's case. York v. Rush Presbyerian-St. Luke's Medical Center, 222 Ill. 2d 147,178 (2006). If reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented, judgment n. o. v. must not be entered. York, 222 Ill. 2d at, 178. A reviewing court cannot usurp the function of the jury by substituting its judgment on questions of fact which are reasonably supported by both parties. York, 222 Ill. 2d at, 178. We review de novo the circuit court's decision denying defendant's motion for judgment n. o. v. York, 222 Ill. 2d at, 178.

In order to prove breach of implied warranty of merchantability, the plaintiff must show; (1) a defect; (2) existing at the time the car left the manufacturer's control; (3) rendering it unfit for the ordinary purposes for which a car is used; and, (4) damages. 810 ILCS 5/2-

314 (west 1998); Tweedy v. Wright Ford Sales, Inc., 64 Ill. 2d 570, 574 (1976) (elements one - three); Kim v. Mercedes-Benz, U.S.A. Inc, 353 Ill. App. 3d 444, 460 (2004) (element four).

Volvo argues, inter alia, that Spiegel failed to prove damages. Damages are an essential element of the prima, facie case for breach of warranty. Kim, 353 Ill. App, 3d at 460.

Without damages there can be no recovery." Valenti v. Mitsubishi Motor Sales of America Inc., 332 Ill, App. 3d 969, 973 (2002). The plaintiff does not have to calculate damages far breach of warranty with mathematical precision but basic contract theory requires that damages be proved with reasonable certainty, precluding damages based on mere conjecture or speculation. Razor v. Hyundai Motor America, 222 Ill. 2d 75,106-07 (2006). The measure of damages for a breach of warranty claim is the difference between the value of the property as warranted and the actual value on the date of the breach. Razor, 222 Ill. 2d at 106-07. The plaintiff bears the burden of establishing the correct measure of damages. Valenti, 332 Ill. App. 3d at 973. A lay witness may give testimony regarding the diminished value of personal property. Kim, 353 Ill, App. 3d at 455. "To establish an appropriate foundation as to the value of personal property, the lay witness, at a minimum, should be able to testify as to the following factors: (1) familiarity with the property in question; (2) actual knowledge of the value of the subject property; and (3) the basis of the knowledge of that value, i.e., how, when and where the witness obtained the knowledge." Kim, 353 Ill. App. 3d at 456-57.

In this case, Spiegel failed to establish the second and third factors of the Kim test" Spiegel testified only that if he had paid $25,000. for the car he would not have brought the law suit. He did not state any basis for this figure. while he did state that he drove the car only 12,000 miles instead of the usual 20,000 miles and took fewer trips than he would like, these are speculative bases for determining the value of the defective car upon purchase. There was no evidence that the car could not have gone on these trips or could not have been driven 20,000 miles a year with the defect. In fact, plaintiff testified that he had driven the car about 70,000 miles at the time of trial. Thus, Spiegel failed to prove the value of the defective car, even when viewed in a light most favorable to Spiegel, and thereby failed to prove a prima facie claim of breach of implied warranty of merchantability, Accordingly, the trial court erred by denying Volvo's motion for judgment n.o.v. on the breach of implied warranty of merchantability claim.

Spiegel attempts to distinguish Kim by noting that the plaintiff failed to comply with Supreme Court Rule 21 regarding disclosure of a witness. 177 Ill. 2d R. 13. Yet, Spiegel ignores the fact that the Kim court discussed the foundation issue regardless of its discussion of the Rule 213 issue. Kim, 53 Ill. App. 3d at 455. Thus, the Kim factors apply here.

Spiegel also contends that his expert Tom Walters offered testimony regarding diminished value but cites to nothing in the record. Therefore, this argument is waived. 188 Ill. 2d R. 341 (e) (7).

Because we have reversed on the basis that Spiegel failed to prove damages and thus failed to prove a prima facie claim of breach of implied warranty of merchantability we need not address the other issues raised by Volvo on appeal.

Reversed.
FITZGERALD SMITH, P.J., with McNULTY and O'MALLEY, JJ., concurring.

SUPREME COURT OF ILLINOIS
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May 31, 2007

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No. 104286 - Marshall Spiegel, petitioner, v. Volvo Cars North America, LLC, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENTED the petition for leave to appeal in the above entitled cause.

Fitzgerald, J., took no part .

The mandate of this Court will issue to the Appellate Court on July 6, 2007.

June 21, 2004
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Marshall Spiegel

v.

Volvo Cars of North America

ORDER

This cause before the Court for trial, a verdict having been returend, and the jury having been polled, now therefore

It is hereby ordered that Judgment is hereby is hereby entered on the verdict as follows:

1. As to Count I, Judgment is entered in favor of Defendant and aginst the Plaintiff,

2. As to Count II, Judgment is entered in favor of Plaintiff and against the Defendant

3. Damages are awarded and judgment is entered in the amount of $10, 680, as itemized in the verdict.